

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

VCR ENTERPRISES, INC., Plaintiff

V.

No. 2:94CV98-B-O

INTERACTIVE VCR GAMES, INC. and
MINUTEMAN PRESS PRINTING, INC., Defendants

MEMORANDUM OPINION

This cause comes before the court on the amended motion to dismiss for lack of personal jurisdiction. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

Plaintiff VCR Enterprises, Inc. [VCR] brought this diversity action against defendants Interactive VCR Games, Inc. [Interactive] and Minuteman Press Printing, Inc. [Minuteman] for, inter alia, an accounting and damages for alleged breach of contract, unjust enrichment and quantum meruit. This action arises out of a series of agreements regarding the production and distribution of combination video/board games. VCR is a Mississippi corporation whose principal place of business at all relevant times was located in Clarksdale, Mississippi. Interactive and Minuteman are Oregon corporations with principal places of business in Oregon. Neither defendant was qualified to do business in Mississippi.

Beginning in 1985, Interactive entered into a series of contracts with VCR that established VCR as an exclusive distributor of sports video/board games. Interactive contracted with Minuteman

to assemble and print necessary materials for the sports games. The contracts between Interactive and Minuteman for the production of the sports games were negotiated and entered into in the State of Oregon. Minuteman manufactured and sold the sports games to Interactive which would then sell them to VCR for sale to retailers. In 1987 VCR acquired the distribution rights to a separate video/board game called 221 Baker Street [Baker Street games] and entered into a separate oral contract with Minuteman to manufacture those games. VCR initiated the contract discussions for the Baker Street games. The contract regarding the Baker Street games was negotiated via telephone, with Minuteman in Oregon and VCR in Mississippi and also during face-to-face meetings in Oregon. At no time did a representative of Minuteman enter the State of Mississippi to negotiate the contract with VCR. Minuteman manufactured all of the Baker Street games in Missouri.

LAW

Minuteman contends that the court lacks personal jurisdiction under the Mississippi long-arm statute, § 13-3-57, and the due process clause of the Fourteenth Amendment. Section 13-3-57, governing service on nonresident businesses not qualified to do business in Mississippi, reads in pertinent part:

Any nonresident person...or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing

business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

VCR contends that the court has personal jurisdiction over Minuteman under the contract prong of the statute. VCR must show that Minuteman and VCR entered into a contract to be performed in whole or in part by either Minuteman or VCR in Mississippi. The Fifth Circuit has held:

[M]erely contracting with a resident of the forum state is insufficient...to subject the nonresident to the forum's jurisdiction.

Rittenhouse v. Mabry, 832 F.2d 1380, 1383-84 (5th Cir. 1987); Colwell Realty Investments v. Triple T Inns, 785 F.2d 1330, 1334 (5th Cir. 1986).

VCR contends that it had, at least, an oral contract with Minuteman regarding the sports games and was not merely a third party beneficiary to the contract between Interactive and Minuteman. See Martin & Martin v. Jones, 616 F. Supp. 339, 343 (S. D. Miss. 1985) (under Mississippi law, a third party beneficiary may not obtain in personam jurisdiction over a nonresident defendant under the contract prong). VCR asserts that the alleged contract is evidenced by its direct payment to Minuteman for the sports games Minuteman assembled. Mark Walbridge, Interactive's chairman, sent VCR'S chief financial officer, David Holcomb, a letter which reads in part:

You are hereby authorized to issue such letters of credit to Minuteman Press of Clackamac for game manufacturing purposes.

All of these funds of course, are applied to the money owed to Interactive VCR Games, Inc. from VCR Enterprises, Inc. for purchase of games.

Accordingly, VCR made payments for the sports games directly from its bank, First Tennessee Bank in Memphis, Tennessee through letters of credit. Minuteman drew on the letters of credit at its bank in Oregon. The second affidavit of William A. Struther, Minuteman's president, states that [t]he letters of credit were in payment of contractual obligations VCR had to Interactive VCR, Inc. This assertion is consistent with Walbridge's above-quoted letter to Holcomb. VCR further submits a letter dated December 22, 1987 from Struthers to W. Horace Allen, VCR's vice-president, to show that Minuteman looked directly to VCR for payment of the sports games. The letter copied to Walbridge, reads in part:

Following is an accounting of our records as to the production of the four [sports] games. Please review and advise us if this balances with your records.

Struthers' second affidavit states that "[t]he letter is simply an accounting which includes the obligations of VCR to Interactive for the Sports games." The complaint does not allege a contract between VCR and Minuteman regarding the sports games. Similarly, Allen's affidavit, the only affidavit submitted by VCR, does not state that VCR and Minuteman had a contract with respect to the sports games. Allen states that, with respect to the sports games, VCR's contract was with Interactive and it was Interactive who contracted with Minuteman. In a deposition taken in a related action brought in Missouri, Holcomb stated in part:

Q. Who did VCR Enterprises have any contract with to produce the [sports] games...?

A. Interactive VCR, we called it Mark Walbridge. We very seldom referred to it as Interactive VCR since we felt like we were dealing with Mark Walbridge personally.

...
Q. Did you at some later point have a better understanding as to the contractual relations that Mark Walbridge had with his sub-contractors for the manufacture of the VCR games?

A. ...I never felt like I was doing business with anybody other than Mark Walbridge....at one point when we were producing documentary letters of credit to facilitate paper flow....it was still for the contractual arrangement with Interactive VCR, Mark Walbridge....payment was going to Minuteman Press for the account of Mark Walbridge.

The court finds that neither the payment arrangement nor Minuteman's accounting distributed to both VCR and Interactive establishes the existence of a contract between VCR and Minuteman with respect to the sports games. The only contract that Minuteman entered into with VCR was the the contract for the production of the Baker Street games.

VCR contends that it performed its obligations under the Baker Street game contract in Mississippi by directing production of the Baker Street games and arranging for payment from its offices in Mississippi. Allen's affidavit states that Allen had numerous telephone conversations with Struthers concerning production of and payment for the Baker Street games. VCR issued letters of credit at its bank in Tennessee for payment of the games and Minuteman drew on letters of credit at its bank in Oregon. Allen's affidavit further states that the games were shipped directly to VCR's customers from Missouri. VCR does not allege that any of its customers, referenced in Allen's affidavit, were located in Mississippi or that Minuteman handled the shipping. In any event, Struthers' affidavit states that, pursuant to the terms of the

contract, VCR took delivery, custody and possession of the games when they were loaded onto the common carrier's trucks in Missouri and made the shipments out of Missouri. VCR asserts that since it performed its contractual obligations in Mississippi, "the fact that Minuteman performed its obligations under this particular contract in Missouri is irrelevant."

With respect to performance of the Baker Street game contract, VCR's payments to Minuteman were made directly from its bank in Tennessee. VCR merely arranged for the issuance of the letters of credit from its offices in Mississippi. The only case cited by VCR in support of its contract theory is clearly distinguishable. Miller v. Glendale Equipment & Supply, Inc., 344 So. 2d 736 (Miss. 1977) (in personam jurisdiction over a nonresident seller of a bulldozer in a breach of contract action). In Miller the Mississippian plaintiff mailed a check to the nonresident defendant who in turn delivered the bulldozer to Mississippi. Id. at 739. This court has construed Miller as follows:

the dispositive fact was that "Glendale [the defendant] delivered the machine through its agent [on one of Glendale's trucks] to Miller in Mississippi using the roadways of this state.

R. Clinton Constr. Co. v. Bryant & Reaves, Inc., 442 F. Supp. 838, 850 (N.D. Miss. 1977). See Rittenhouse, 832 F.2d at 1382 n.2 (noting that the bulldozer "was delivered into Mississippi pursuant to the seller's contractual obligation to do so"). In the instant cause VCR made no payment directly from Mississippi and there is no allegation or evidence that Minuteman delivered Baker Street games to Mississippi. The court finds that VCR's payment arrangement

does not constitute partial performance of its contract in Mississippi.

VCR further contends that it performed its contractual obligations in directing production of the games through numerous long-distance phone conversations between its vice-president in Mississippi and Minuteman's president. The court finds that such communication does not constitute partial performance of a contract in Mississippi. See Reed-Joseph Co. v. DeCoster, 461 F. Supp. 748, 750 (N.D. Miss. 1978). The court in Reed-Joseph Co. noted that negotiations were conducted by telephonic means and correspondence and that the nonresident defendant was never present in Mississippi, the forum state, at any time. Id.

For the foregoing reasons, the court concludes that Minuteman's amenability to service of process is not within the reach of Mississippi's long-arm statute. Even if personal jurisdiction could be justified under the statute, serious constitutional considerations remain. Under the due process inquiry, the nonresident defendant must purposefully establish minimum contacts with the forum state, and the exercise of jurisdiction must result in fair play and substantial justice. Interfirst Bank Clifton v. Fernandez, 844 F.2d 279 (5th Cir. 1988). In an action in which no representative of the nonresident defendant visited Mississippi during the negotiation process or at any time, as in the instant cause, the court found that the defendant "took no actions directed toward Mississippi and neither sought nor expected any benefits from this state." General Equip. Mfrs. v. Coco Bros., Inc., 702 F. Supp. 608, 612 (S.D. Miss. 1988).

The court in General Equip. Mfrs. stated:

The nonresident's activities in or connected with the forum state must be such that "it should reasonably anticipate being haled into court [there]."

Id. at 611; Stuart v. Spademan, 772 F.2d 1185, 1190 (5th Cir. 1985). In the instant cause, it is undisputed that VCR initiated the contract discussions regarding the Baker Street games. Minuteman's contacts, with respect to the sports games,¹ as well as the Baker Street games, are insufficient to suggest that Minuteman purposefully availed itself of the benefits of the forum state of Mississippi.

Accordingly, the court finds that Minuteman's motion to dismiss for lack of personal jurisdiction should be granted. A default was entered against defendant Interactive. It appears that the court lacks personal jurisdiction over Interactive. However, unlike the defense of lack of subject matter jurisdiction, a personal jurisdiction defense may be waived by the defendant under Rule 12(h)(1) of the Federal Rules of Civil Procedure. Therefore, only the claims against Minuteman will be dismissed.

An order will issue accordingly.

THIS, the _____ day of July, 1995.

¹VCR's allegation that Minuteman delivered approximately 100,000 sports games to Mississippi is without a factual basis. Allen's affidavit states that "approximately 100,000 [sports games] were shipped from Minuteman's assembly plant in Oregon to VCR's warehouse in Clarksdale, Mississippi...." Allen states in his affidavit that shipping and advertising were his primary responsibilities. Nowhere in the affidavit does Allen state that Minuteman shipped the games and VCR submits no other affidavits. Struthers' second affidavit states that the shipments were made by VCR, as reflected by bills of lading attached to the affidavit.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE